United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1428 Original

B
P/C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES ex rel. WILLIAM CADOGAN, :

Relator-Appellant, :

-against- : 74 - 1428

J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York, :

Respondent-Appellee. :

----------X

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
2 World Trade Center
New York, N.Y. 10047
Tel. 488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Arlene R. Silverman, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent herein. On the 7th day of June, 1974, she served the annexed upon the following named person :

Wellington A. Newcomb
36 W. 44th St.
My Ny - 36

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at 80 Centre Street, New York, New York 10013, directed to said Attorney at the address within the State designated by him for that purpose.

Arlene R. Silverman

Sworn to before me this
7th day of June, 1974

Joel Lettes

Assistant Attorney General
of the State of New York

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES ex rel. WILLIAM CADOGAN, :

Relator-Appellant, :

-against- : 74 - 1428

J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York, :

Respondent-Appellee. :

----------X

BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Did the District Court abuse its discretion by not assigning counsel to represent petitioner on his habeas corpus application where no evidentiary hearing was required and where the District Court fully explored all the arguments raised upon the state court record.

Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (Port, J.) dated March 4, 1974, which denied petitioner's application for a writ of habeas corpus.

Prior Proceedings

Appellant was convicted, after a jury trial, in the Queens County Court of feloniously possessing a narcotic drug and was sentenced on June 7, 1956 to a term of from nine to ten years. On November 18, 1957, he was resentenced nunc pro tunc to a term of from five to ten years.* The Appellate Division affirmed, People v. Cadogan, 12 A D 2d 647 (2d Dept. 1960).

Subsequently, petitioner was tried and convicted in the Supreme Court, Queens County of three narcotics felony offenses. On November 19, 1963, he was sentenced as a multiple offender to concurrent terms of 15 to 30 years, 15 to 30 years and six to 20 years.

In his federal habeas corpus petition appellant attacked the predicate conviction on the grounds that (1) unconstitutionally seized evidence was introduced at trial (2) a Bruton violation occurred and (3) he was denied his right to appeal. Additionally petitioner submitted further papers on December 2, 1973, raising the claim that his sentence was excessive.

On March 4, 1974, Judge Port denied petitioner's application. On March 14, 1974 the District Court granted

*The original sentence was in excess of that provided by New York Law.

petitioner a certificate of probable cause. On April 1, 1974, this Court assigned counsel pursuant to the Criminal Justice Act.

Opinion of the District Court

Judge Port stated that he had obtained the trial transcript of petitioner's 1956 and 1963 convictions from the Queens County Clerk as well as the various other papers documenting petitioner's collateral proceedings in the Queens County Supreme Court.

With respect to petitioner's first claim Judge Port held that Mapp v. Ohio, 367 U.S. 643, decided in 1961, is not retroactive. Since petitioner's conviction was affirmed on December 14, 1960 and no further direct action was sought, Judge Port found the first claim without merit.

Insofar as a Bruton claim was raised the Court observed that Bruton is retroactive but held that any error in admitting an implicating statement of a codefendant was harmless error, citing Harrington v. California, 395 U.S. 250 (1969) and Chapman v. California, 386 U.S. 18 (1967).

As for petitioner's claim that he was denied his right to appeal from his June 6, 1965 conviction, the Court found this claim belied by the fact that the conviction was

affirmed by the Appellate Division on December 14, 1960. People v. Cadogan, 12 A D 2d 647 (2d Dept. 1960). Petitioner also claimed that he was denied his right to appeal because he was not advised by the Appellate Court or counsel of his right to petition the New York Court of Appeals for review of the affirmance of the Appellate Division. Judge Port held that there was no precedent requiring that petitioner be advised of this possibility. Moreover, the Court observed that petitioner failed to allege that he was unaware that he might seek leave to appeal.

Finally, Judge Port considered a further claim of petitioner relating to his sentence as a second felony offender pursuant to § 1941(1) of the New York Law of 1909. Petitioner claimed that the length of the sentence received violated his constitutional rights. Judge Port held the sentence was within the statutory limits and that petitioner's claim raised no issue cognizable in federal Habeas corpus.

The application was, in all respects, denied.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR THE ASSIGNMENT OF COUNSEL.

Petitioner's sole argument in this Court is that the District Court should have appointed counsel to represent

him on his habeas corpus application. However, it is well established in this Circuit that the appointment of counsel on a habeas corpus application is within the discretion of the District Court, especially where no evidentiary hearing is required. Cole v. Mancusi, 429 F 2d 61 (2d Cir. 1970), cert. den. 401 U.S. 957; U.S. ex rel. Wissenfeld v. Wilkins, 281 F 2d 707 (2d Cir. 1960).

Petitioner's application in the Northern District Court was supplemental to a petition previously filed in the Western District and denied by Judge Henderson on August 28, 1972 for failure to exhaust state remedies. (1971 Civil 163).

Petitioner's original and supplemental application set forth with sufficient clarity the arguments he sought to raise and Judge Port, who had before him petitioner's complete file from Queens County, gave them the fullest consideration.

Petitioner does not complain that Judge Port overlooked any of his claims, and, at best, petitioner's argument here is that an attorney could have aided him in presenting his claims more fully.

However, and most significantly, Judge Port granted petitioner a certificate of probable cause and this Court assigned counsel on this appeal who was free to explore and

argue any of petitioner's claims in greater depth in an attempt to overturn the District Court's decision. The records of petitioner's conviction were before the District Court, and were returned to the Queens County Clerk. These records were available to counsel in this Court in the Queens County Clerk's office for review and for further submission to this Court as exhibits which is the normal procedure followed on appeal of a federal habeas corpus application arising out of a state court conviction. Under these circumstances, petitioner's rights have been amply protected and the claim that the District Court abused its discretion in failing to assign counsel is without merit.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
June 6, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel